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Supreme Court, U.S.
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No. 99-1417

In The

Supreme Court of the United States

STATE OF CALIFORNIA,
DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

WILLIAM ROBERT DARE AND GARY PETILLO,
individually and on behalf of others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner agrees with respondents that permeating the Petition is the question of whether a constitutional challenge is limited to a federal enactment as a whole or whether a challenge may be brought against a particular regulation designed to enforce a federal enactment. In *Dare v. State of California Department of Motor Vehicles*, 191 F.3d 1167, 1173, n.2 (9th Cir. 1999), Appendix 11, n.2, the Ninth Circuit Court of Appeal stated that "regulations do not receive an independent constitutional assessment" and refused to consider whether the regulation constituted an improper abrogation of state sovereignty as held in *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), *petition for cert. filed* (August 8, 1999) (99-424). In support of its holding in *Brown*, the Fourth Circuit Court of Appeal stated that "[f]ocusing only upon the statute and ignoring the regulation would artificially hinge the weighty structural protections of state sovereign immunity upon a congressional choice of rulemaking efficacy." (*Id.* at 704.)

The conflict of law between the Ninth and Fourth Circuits is highly controversial and ripe for review. This is demonstrated by the fact that petitions for certiorari have been filed in both *Dare* and *Brown*. Interestingly, counsel for respondents here are also counsel for petitioners in *Brown*. In that petition they state: "The Fourth Circuit's decision . . . merits review because the panel decided an important federal question in a way that conflicts with relevant decisions of this Court, and that conflicts with the decisions of other courts of appeals." (Petition for Certiorari at 4, *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999) (99-424).)

The split between the Fourth and the Ninth Circuits creates an intolerable conflict which the appellate courts will not be able to resolve themselves. Depending on geographical location, certain states will have more constitutional protection than others. Either the appellate court will allow a state to challenge the constitutionality of a regulation independent of the underlying enactment or it will not. A compelling need exists for a uniform rule on this point. This is a controversy that only the United States Supreme Court can resolve.

Petitioner also agrees with respondents that the dismissal of the *Alsbrook v. City of Maumelle*, 684 F.3d 825 (8th Cir. 1999), *cert. granted in part by* 120 S.Ct. 1003 (January 25, 2000) (99-423) *cert. dismissed* (March 1, 2000), petition makes moot the relationship between the issues in *Alsbrook* and the issues in *Dare* for the purpose of granting the *Dare* petition. However, the issues in *University of Alabama Bd. Of Trustees v. Garrett*, 193 F.3d 1214 (11th Cir. 1999) *cert. granted in part* (99-1240), though sufficiently broad to subsume the issues raised here, will not necessarily do so. Unless this Court determines that Title II of the Americans With Disabilities Act is an improper abrogation of state sovereignty, the controversy between the Fourth and Ninth Circuit will remain a festering conflict, depriving certain states of the constitutional protections provided to others. In the event that this Court determines that Title II is constitutional in its review of *Garrett*, the more narrowly-framed issues raised in the *Dare* petition remain highly relevant to protecting state sovereignty.

Petitioner disagrees with respondents' contention that, in light of *Ex parte Young*, the only question that will

be answered if the petition for certiorari is granted is "whether suit must be against an officer of the Department of Motor Vehicles." (Respondents' Brief at 15.) The constitutionality of state policy and the actions of state officials outside the context of Congress's attempt to abrogate state sovereignty has not been pleaded and is not before this Court.

Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), permits, in certain circumstances, a party to pursue a claim in federal court to enjoin a State officer from enforcing an unconstitutional State policy. (*See id.*; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (Kennedy, J., majority).) However, *Young* is not applied to every conceivable circumstance and respondents make no showing that this case meets the criteria necessary to apply the *Young* exception to petitioner's sovereign immunity. (*See, e.g.*, *Coeur d'Alene, supra*, 521 U.S. 261; *Edelman v. Jordan*, 415 U.S. 651, 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Pennhurst State School v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).) Thus, a decision by this Court will not answer a question that was never asked.

CONCLUSION

The petition should be granted.

Dated: May 9, 2000

Respectfully submitted,

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